IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 1:07-cr-00090-WYD

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. B&H MAINTENANCE & CONSTRUCTION, INC., a New Mexico corporation;
2. JON PAUL SMITH a/k/a J.P. SMITH; and
3. LANDON R. MARTIN,

Defendants.

UNITED STATES' OPPOSITION TO "DEFENDANT B&H'S MOTION FOR PRODUCTION OF RULE 801(d)(2)(E) MATERIALS AND FOR PRETRIAL DETERMINATION OF ADMISSIBILITY OF ALLEGED COCONSPIRATORS' STATEMENTS AT A *JAMES* HEARING" (DOCKET # 45)

Defendant B&H Maintenance & Construction, Inc. ("B&H") has moved this Court to: (1) order the United States to produce Rule 801(d)(2)(E) Materials; and (2) conduct a pretrial *James* hearing to determine the admissibility of coconspirator statements. (Def. B&H Mot. for 801(d)(2)(E) and Pretrial *James* Hr'g (Docket # 45).)[1]

The Court should deny as moot B&H's Motion for an order to produce Rule 801(d)(2)(E) materials because the United States has already produced to the Defendants the material that

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[1] Should the Court grant "Landon Martin's Motion For Leave to Join Motions Filed by Co-Defendant B&H Maintenance and Construction, Inc." (Docket # 49), this Response would also apply to Defendant Martin.

contains coconspirator statements.[2]

The Court should deny Defendant B&H's Motion for a pretrial *James* hearing because a hearing prior to trial in this straightforward case is unnecessary, would be an inefficient use of judicial time and resources, and is clearly not required by Tenth Circuit precedent. There are only three individual conspirators in this case – two are defendants (J.P. Smith and Landon Martin), one will be a government witness at trial (Kenneth Rains). The United States will establish by a preponderance of the evidence the requisite foundation for admission of coconspirator statements by Defendants Smith and Martin at trial through the testimony of Mr. Rains. This is a simple, efficient process approved by the Tenth Circuit.

Moreover, to aid the Court in making the conspiracy findings at trial and to expedite this matter, the United States will make its preliminary factual showing as to the admissibility of coconspirator statements by voluntarily filing, one week prior to trial or at whatever time this Court directs it to do so, a written *James* proffer.

FACTS

The bid rigging conspiracy charged in the Indictment is a conspiracy involving only two corporate conspirators -- Defendant B&H and Flint Energy Services, Inc. ("Flint") – which lasted from about June 2005 until about December 2005. Defendants J.P. Smith and Landon Martin are the individual coconspirators that acted on behalf of Defendant B&H. Smith was the vice president and general manager of B&H's office in Bloomfield, New Mexico, and had the final

[2] *See also* "United States' Opposition to Motion by Defendant Smith for Discovery (Docket # 51) and Defendant B&H's Motion for Discovery" (Docket # 43), filed on this date.

approval of all bids submitted by that office. Martin was the marketing manager of B&H's office in Bloomfield and was the person at B&H's Bloomfield office that submitted bids electronically to BP America Production Company's ("BP America").

Kenneth L. Rains is the individual coconspirator that acted on behalf of Flint. Mr. Rains was the Regional Manager of Flint's office in Farmington, New Mexico, and had final approval of all bids submitted by that office. On August 7, 2006, Rains and Flint both admitted their role in the bid rigging conspiracy and pled guilty to rigging bids submitted to BP America's Durango, Colorado office. Rains will testify at trial.

ARGUMENT

I. The Court Should Deny as Moot Defendant B&H's Request for Production of Potential Rule 801(d)(2)(E) Material because the United States Has Already Produced Potential Rule 801(d)(2)(E) Material

As noted by Defendant B&H in the first paragraph of its Motion, the Defendants are already in possession of the coconspirator material in this case. (Def. B&H Mot. for 801(d)(2)(E) and Pretrial *James* Hr'g ¶ 1.) On March 22, 2007, less than 10 days after Indictment, and prior to any request by the Defendants, the United States produced the FBI-302 memoranda of interviews with Defendants Smith and Martin. Additionally, while not required by Federal Rules of Criminal Procedure 16(a) or the Jencks Act, 18 U.S.C. § 3500, that same day the United States also produced the FBI-302 memoranda and paralegal notes of interviews with the other individual coconspirator in this case, Kenneth L. Rains.[3] *Cf. United States v.*

[3] Indeed, far exceeding any discovery requirements, the United States has voluntarily produced the FBI-302 memoranda or paralegal notes of interviews of any potential witness in

Metropolitan Enterprises, Inc., 728 F.2d 444, 451 (10th Cir. 1984) (bid rigging conviction affirmed where United States did not identify coconspirators until three days before testimony); *United States v. Penix*, 516 F. Supp. 248, 256-257 (W.D. Okla. 1981) (motion for pretrial discovery of coconspirator statements denied). Further, going beyond its Rule 16(a) obligations to make documents available for inspection and copying, on April 25, 2007, the United States produced copies of documents obtained from coconspirator Flint Energy Services, Inc. and the victim, BP America Production Company, that may contain coconspirator statements.[4] Therefore, the Court should deny Defendant B&H's request for the production of Rule 801(d)(2)(E) material as moot.

II. The Court should deny Defendant B&H's Motion for a pretrial *James* hearing to establish the existence of a conspiracy because the requisite foundation for admission of coconspirator statements will be established at trial well beyond a preponderance of the evidence

A coconspirator statement is admissible against a defendant only after the Court determines, by a preponderance of the evidence, that (1) the conspiracy existed; (2) the defendant and the declarant were members of the conspiracy; and (3) the statement was made during the course of and in furtherance of the conspiracy. *Bourjaily v. United States*, 483 U.S. 171, 175 (1987); *United States v. James*, 590 F.2d 575, 582 (5th Cir. 1979) (*en banc*), *cert. denied*, 442 U.S. 917 (1979); *United States v. Andrews*, 585 F.2d 961, 964-966 (10th Cir. 1978).

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this case.

[4] Defendant B&H had retained copies of all the documents it produced to the United States during the investigation and agreed to share those documents with its codefendants.

There is no requirement in the Tenth Circuit that district courts conduct a hearing before trial to make the requisite factual determinations. *United States v. Monaco*, 700 F.2d 577, 581 (10th Cir. 1983) (the defendant has no distinct right to a pretrial hearing with regard to the conspiracy determination). There are only three individual coconspirators in this case: Kenneth Rains and Defendants Smith and Martin. The United States intends to call Mr. Rains as a witness at trial, and he will provide the evidence which satisfies all three elements for the admission of coconspirator statements by Defendants Smith and Martin.

Because Mr. Rains' testimony will establish the requisite foundation for the admissibility of coconspirator statements at trial, a pretrial hearing is not required by Tenth Circuit law, and is certainly unnecessary for a conspiracy of limited duration (about seven months) involving only three individual coconspirators. Consequently, the Court should deny Defendant B&H's request for a hearing prior to trial.

Moreover, to aid the Court in making the conspiracy findings at trial as required by *Andrews*, 585 F.2d at 964-966, and its progeny, and to expedite this matter, the United States will make its preliminary factual showing as to the admissibility of coconspirator statements by voluntarily filing, one week prior to trial or at whatever time this Court directs it to do so, a written *James* proffer.

In *United States v. Petersen*, 611 F.2d 1313, 1330 (10th Cir. 1979), the Tenth Circuit recommended that district courts follow the procedure set forth in *James* when determining the admissibility of coconspirator statements. Thus, the preferred procedure for the court in making the threshold determination of the admissibility of coconspirator statements "require[s] the

Government to first introduce independent proof of the conspiracy, and subsequent thereto, to establish the connection of the defendant with the conspiracy" before the court admits coconspirator statements. *Id.* at 1330. However, the United States is not required to produce this proof prior to trial. There is "no distinct right to a pretrial hearing with regard to the conspiracy determination." *United States v. Hernandez*, 829 F.2d 988, 994 (10th Cir. 1987) (citing *Monaco*, 700 F.2d at 581).

The Tenth Circuit has consistently rejected the necessity of a "mini-trial" on the merits of the evidence prior to trial. *See e.g. United States v. Williamson*, 53 F.3d 1500, 1518 (10th Cir. 1995); *United States v. Urena*, 27 F.3d 1487 (10th Cir. 1994); *United States v. Pinto*, 838 F.2d 429, 433 (10th Cir. 1988) (quoting *Hernandez*); *Hernandez*, 829 F.2d at 994; *United States v. McMurry,* 818 F.2d 24, 26 (10th Cir. 1987) (citing *Monaco); Monaco*, 700 F.2d at 581. Indeed, as then Chief Judge Finesilver said, "[w]here the government has provided a defendant with full discovery, that defendant will be well aware of any statements which may be offered against him at trial. In those circumstances, we conclude that a defendant would not be prejudiced in the preparation of a defense if a pretrial hearing is not held, nor would such a hearing expedite the proceedings." *United States v. Barker*, 623 F. Supp. 823, 832 (D. Colo. 1985); *See also United States v. Graham*, No. 03-CR-89-RB, 2003 WL 23156628 at *1-2 (D. Colo. December 2, 2003) (unpublished) (no *James* hearing required where United States, pursuant to order of the judge, submitted a written *James* proffer with exhibits).[5]

[5] *See* attached Exhibit A.

Furthermore, the *James* Court recognized that the United States does not always even need to make this showing prior to the court admitting coconspirator statements and that the "court may admit the statement[s] subject to being connected up." *James* 590 F.2d at 582. In *Hernandez*, the Tenth Circuit made it clear that "this order of proof does not involve a right to a pretrial hearing on admissibility, and in no way precludes the trial judge from exercising his considerable discretion and conditionally admitting the statements subject to later being connected up." *Hernandez*, 829 F.2d at 994 n. 6. The Tenth Circuit has approved the practice of admitting coconspirator statements subject to being connected up numerous time. *See e.g. Urena*, 27 F.3d at 1491; *Pinto*, 838 F.2d at 432; *Hernandez*, 829 F.2d at 993; *Petersen*, 611 F.2d at 1330.

CONCLUSION

For the reasons set forth above, the United States respectfully requests that the Court deny "Defendant B&H's Motion for Production of Rule 801(d)(2)(E) Materials and For Pretrial Determination of Admissibility of Alleged Coconspirators' Statements At A *James* Hearing."

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2007, I electronically filed the foregoing United States' Opposition to "Defendant B&H's Motion for Production of Rule 801(d)(2)(E) Materials and for Pretrial Determination of Admissibility of Alleged Coconspirators' Statements At A *James* Hearing" with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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I hereby certify that I have mailed or served the document or paper to the following non CM/ECF participants in the manner indicated by the non-participant's name:

None.

Respectfully Submitted,

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